



Telecommunications
Law Professionals PLLC

1025 Connecticut Avenue, NW
Suite 1011
Washington, DC 20036
telephone 202.789.3120
facsimile 202.789.3112
www.telecomlawpros.com

cnorthrop@telecomlawpros.com
202.789.3113

July 10, 2015

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Ex Parte
WT Docket No. 14-170, *Updating Part 1 Competitive Bidding Rules*
GN Docket No. 12-268, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*
RM-11395, *Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or Interim Conditional Waiver*
WT Docket No. 05-211, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*

Dear Ms. Dortch:

On July 8, 2015, Carl W. Northrop and E. Ashton Johnston of Telecommunications Law Professionals PLLC, on behalf of the Auction Reform Coalition ("ARC"), met with Valery Galasso, Policy Advisor to Commissioner Jessica Rosenworcel, regarding the above-referenced proceeding. The substantive positions taken in the meeting were consistent with the formal comments submitted by ARC in the proceeding.

In the course of the meeting, ARC supported several aspects of the draft order as described in the Fact Sheet released by Chairman Wheeler on June 25, 2015, including (1) the adoption of new higher revenue thresholds for DEs; (2) retention of the five-year unjust enrichment period; (3) removal of the "facilities-based service" requirement; and (4) evaluating DE eligibility on a "license-by license" basis. And, while ARC questions whether any cap on small business bidding credits can be supported by the record as a whole or the statutory scheme, it was glad to learn that the draft order rejects the Draconian proposal of some opponents of the DE program to cap all DE benefits at \$10 million.

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ARC does, however, have serious concerns with regard to the number of markets which might be subject to the lower \$10 million cap. The referenced Fact Sheet indicated that this cap would only apply in the “smallest markets.” However, it appears that may not be the case. In recent *ex parte* filings, rural telephone companies have suggested that the \$10 million cap apply to all Partial Economic Areas (“PEAs”) with a population of less than 500,000.¹ At that population demarcation, *more than 70 percent* of all PEAs (297 out of 416) would be subject to the cap. A \$10 million cap that encompasses the vast amount of the country’s population and geography cannot reasonably be described as applying to the “smallest markets.” More importantly, it would completely defeat the statutory requirement that the Commission avoid an undue concentration of licenses and foster the broad dissemination of licenses to DEs.²

Should the Commission adopt a separate cap on bidding credits based on market size, the rule must be sufficiently narrow so as not to limit the ability of legitimate small businesses to implement flexible business plans that provide them the opportunity to compete effectively, by both acquiring multiple licenses within a market and acquiring spectrum across a broad cross section of markets, small, medium and large.³ Setting the threshold at markets of 500,000 or less encompasses not only the “smallest markets,” but also a large number of significant markets (e.g., state capitals Madison, WI (PEA 122) and Springfield, IL (PEA 129) and markets that because of their relative proximity may be attractive to bidders seeking economies of scale (e.g., Yakima, WA (PEA 119), Olympia, WA (PEA 124, and Spokane, WA (PEA 130) and smaller adjacent markets; and Sanford, NC (PEA 131), Wilmington, NC (PEA 146), Winston-Salem, NC (PEA 151), and smaller adjacent markets). There simply is no analysis in the record

¹ See, e.g., Letter from Donald L. Herman, Jr., Counsel to Rural-26 DE Coalition, to Ms. Marlene Dortch, WT Docket No. 14-170, at 1 (July 7, 2015).

² A \$10 million cap would mean that a very small business qualifying for a 25% bidding credit would reach the cap spending \$40 million dollars in these markets. In Auction 97, prices exceeded \$2.00 per MHz pop on average. If this pricing holds in the Broadcast Incentive Auction, a DE would be able to buy only 20 MHz in markets with a population of 500,000. In effect, the Commission would be predetermining that DEs cannot achieve scale and relegate them to a marginal status relative to established providers.

³ ARC believes that the Commission should define “smallest” only in relation to large and medium-size markets. For example, one-third of all PEAs could be deemed large, one-third medium, and one-third small, resulting in markets below PEA 278 (approximately 179,000 pops) being subject to a \$10 million cap. Alternatively, the cap could apply to PEAs with populations below 100,000 (encompassing 82 PEAs). Of course, any cap is inherently arbitrary because it focuses on *limiting* a DE’s participation rather than on the statutory goals of disseminating licenses and promoting spectrum-based businesses. And, a cap introduces the risk that a DE ultimately will be forced to place (or abandon) its bids based on the limiting factor of the dollar amount of the cap, not on implementing its business strategy or using capital efficiently.



of how a \$10 million cap on spectrum in 70 percent of the available markets will affect small business bidders.

In sum, ARC urged Commissioner Rosenworcel's office not to allow the opponents of the DE program to further undermine the program by imposing the many poison pills they had proposed. The Commission is under a statutory mandate to broadly disseminate licenses to DEs and to avoid an undue concentration of licenses, and none of the opponents of the reforms proposed by the Commission have made any showing that their restrictive proposals are consistent with this statutory mandate.

Pursuant to Section 1.1206 of the Commission's rules, this notice is being filed electronically with the Office of the Secretary.

Respectfully submitted,

Carl W. Northrop
of TELECOMMUNICATIONS LAW PROFESSIONALS PLLC

cc: Valery Galasso (by email)